

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1959

No. 2039

ELI LILLY AND COMPANY,

*Appellant,*

*vs.*

SAV-ON-DRUGS, INC.,

*Appellee,*

*and*

STATE OF NEW JERSEY,

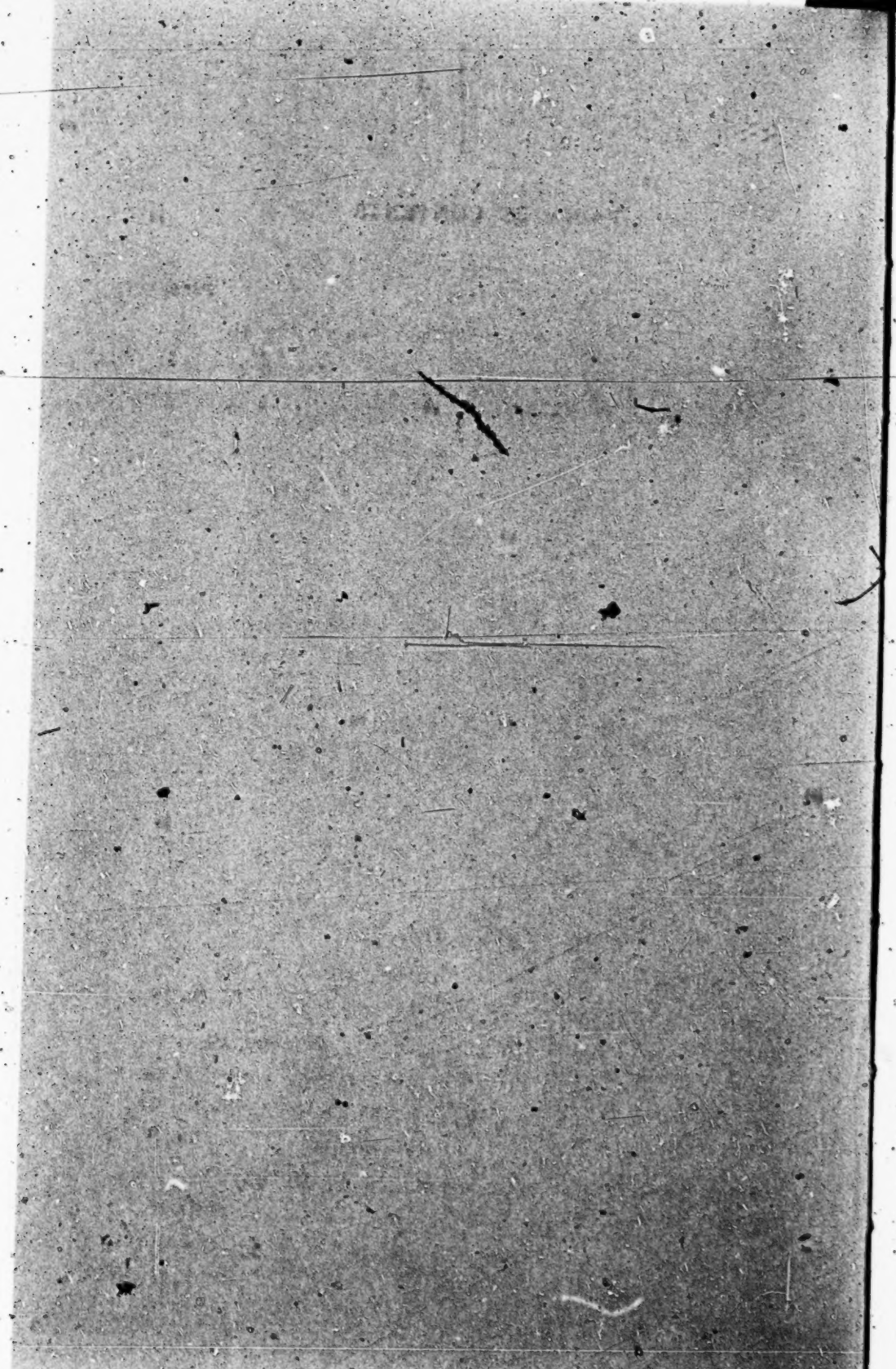
*Intervenor-Appellee.*

On Appeal From Judgment of the Supreme Court  
of New Jersey

**MOTION TO DISMISS AND  
BRIEF IN SUPPORT THEREOF**

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*Appellant,*

**vs.**

**SAV-ON-DRUGS, INC.,**

*Appellee,*

**and**

**STATE OF NEW JERSEY,**

*Intervenor-Appellee.*

**On Appeal From Judgment of the Supreme Court  
of New Jersey.**

\_\_\_\_\_  
**Motion to Dismiss or in the Alternative  
to Affirm Summarily**

The State of New Jersey, intervenor-appellee, moves to dismiss this appeal on the ground that no substantial Federal question is presented, or in the alternative, to affirm the judgment below summarily on the ground that the said judgment is so clearly correct on the merits that no further argument is required.



## Question Presented

When the undisputed facts show that Eli Lilly and Company leases an office and employs a district manager and eighteen full time salaried employees in New Jersey whose work consists of promoting sales and transmitting purchase orders between local wholesalers and local drugstores, is it a violation of the Interstate Commerce Clause of the Federal Constitution for a New Jersey court to dismiss Eli Lilly's Fair Trade suit which seeks to control retail prices in New Jersey, as the result of plaintiff's refusal to register as a foreign corporation?

## Summary

Plaintiff, Eli Lilly and Company, leases a New Jersey office and employs a district manager and eighteen other full time salaried employees in New Jersey to induce New Jersey drugstores to purchase Eli Lilly products from New Jersey wholesalers. Plaintiff's employees also transmit purchase orders from drugstores to wholesalers. Eli Lilly is therefore engaged in intrastate commerce in New Jersey. The Fair Trade suit which plaintiff instituted below seeks to enjoin a local drugstore from selling Eli Lilly products to a local customer except at minimum prices fixed by Eli Lilly pursuant to the "nonsigner provision" of the New Jersey Fair Trade Law. Because Eli Lilly is engaged in intrastate commerce, the dismissal of plaintiff's Fair Trade suit as a result of its refusal to register as a foreign corporation does not raise a substantial federal question under the Interstate Commerce Clause.

Even if there were doubt about whether plaintiff's undisputed activities in New Jersey constitute doing a local business, this appeal would still not raise a substantial federal question. The requirement that plaintiff register as a foreign corporation is far lighter than state regula-

tions of corporations engaged in interstate commerce which this Court has frequently upheld. Enforcement of the registration requirements by barring plaintiff from maintaining a Fair Trade suit in the New Jersey courts unless it registers does not unconstitutionally burden interstate commerce because the suit seeks to control retail prices, a matter which Congress has expressly recognized to be a matter for local regulation and because the dismissal of the suit does not prevent plaintiff from continuing its interstate business.

### Counter-Statement of Facts\*

Eli Lilly and Company (plaintiff-appellant) has appealed to this Court from a judgment of the New Jersey Supreme Court affirming the dismissal of its complaint filed in the New Jersey Superior Court, Chancery Division, against Sav-on Drugs, Inc. (defendant-respondent).

Eli Lilly is a manufacturer of pharmaceutical products which it sells to "local wholesale distributors" throughout the country. (Record 31a-17 to 23, 33 to 40). These wholesalers in turn sell Eli Lilly products to physicians and institutions for their use and to drugstores for retail sale to the general public under Eli Lilly's various trademarks (Record, 31a-28 to 40; 33a-30 to 40; 34a-4 to 27). Sav-On Drugs, Inc. is the operator of two New Jersey drugstores which sell Eli Lilly products. Record, 28-15 to 24.

Plaintiff's complaint alleges that Sav-On Drugs, Inc.'s two New Jersey drugstores have sold commodities bear-

\* Unless otherwise indicated page references to "Record" refer to the pages of the plaintiff's printed appendix which is entitled in the Superior Court of New Jersey and was filed in the Supreme Court of New Jersey. This appendix constitutes the record which the Clerk of the Supreme Court of New Jersey was requested to transmit to the Clerk of the Supreme Court of the United States.



ing Eli Lilly trade-marks at prices lower than those stipulated in plaintiff's minimum retail price maintenance contracts. (Record, 10a-22 to 35; 11a-9 to 34). Although Sav-On Drugs has not entered into any such contracts, plaintiff alleges that Sav-On Drugs is legally obligated to maintain the minimum prices specified therein because of the "nonsigner provision" of the New Jersey Fair Trade Law (N. J. Rev. Stat. 56:4-6). (Record, 2a-22 to 40; 3a-5 to 13). On the basis of these allegations, plaintiff's complaint asks for an injunction against Say-On Drugs, Inc. to prevent any further violations of Eli Lilly's price maintenance program. (Record, 12a-30 to 40; 13a-5 to 15).

On defendant's motion for summary judgment, the complaint was dismissed on the ground that the undisputed facts contained in the affidavits of both parties showed that Eli Lilly was a foreign corporation doing business in New Jersey without having registered with the New Jersey Secretary of State. N. J. Rev. Stat. 14:15-3, 14:15-4 and 14:15-5. The trial court expressly held first, that the continuous course of activity which Eli Lilly was conducting in New Jersey constituted "transacting \* \* \* business" within the meaning of N. J. Rev. Stat. 14:15-3; and, secondly, that a suit under the "nonsigner provision" of the New Jersey Fair Trade Law (N. J. Rev. Stat. 56:4-3) was a suit "upon a contract made in this State" within the meaning of N. J. Rev. Stat. 14:15-4. (Opinion, Plaintiff's Appendix C.)

The New Jersey Supreme Court affirmed without opinion.

The affidavits on the motion for summary judgment show that although Eli Lilly itself sells its products only to local wholesalers, Eli Lilly employees conduct an extensive campaign in New Jersey to induce local drugstores, physicians and hospitals to purchase Eli Lilly products from these New Jersey wholesalers. Eli Lilly and Company employs a district manager and eighteen salaried "retail men" in New Jersey to visit retail pharmacists, physicians and hospitals (Record, 33a-29 to 40) and to perform "promotional and informational work \* \* \* to acquaint retail

pharmacists, physicians and hospitals with the products of Eli Lilly and Company so that the said retail pharmacists, physicians and hospitals will order Lilly products from local wholesale distributors" (Record, 31a-33 to 39). Eli Lilly's "detail men" examine the retailer's stock "to ascertain whether the retailer may be carrying a sufficient supply to meet potential demand," and they make "recommendations to the retailer relating to the enlargement of his available supply" (Record, 34a-19 to 26). This is done "with a view to encourage the purchase and use of said retail products by such institutions and professional men" (Record, 33a-38 to 40). Plaintiff's "detail men" receive orders from retailers in the course of their work, and they transmit such orders to the appropriate local wholesaler for the latter's acceptance or rejection (Record, 34a-9 to 14).

To support its campaign of promoting local sales by local wholesalers, plaintiff maintains an office at 60 Park Place, Newark, New Jersey. Although this office is leased in the name of plaintiff's manager, he is reimbursed by plaintiff "for all expenses incidental to the maintenance and operation of said office" (Record, 33a-18 to 29). Eli Lilly's name appears on both the door of the office and on the tenant registry in the lobby of the building (Record, 27a-20 to 26). The September 1959 issue of the Newark telephone directory lists the plaintiff in both the regular section of the directory and also in the classified section under "pharmaceutical products" as having an office at 60 Park Place, Newark (Opinion, Appendix C, p. 29). This office is in charge of plaintiff's district manager and a secretary, both of whom are paid by plaintiff on a salary basis (Record, 33a-10 to 34). Both the plaintiff corporation and its district manager receive correspondence there (Record, 33a-25 to 32).

Eli Lilly and Company has entered into over 1500 Fair Trade contracts with New Jersey retail druggists to control the prices of retail sales of its products within the State

(Record, 2a-39 to 3a-8). The record does not show how many other New Jersey druggists there are who, without themselves having signed plaintiff's Fair Trade contracts, are nonetheless legally obligated to maintain Fair Trade prices because of the "nonsigner provision" of the New Jersey law. To enforce its retail price maintenance program in New Jersey, plaintiff has instituted at least 33 separate legal proceedings in New Jersey courts to secure injunctive relief against New Jersey retailers (Record, 4a-8 to 5a-40).

## ARGUMENT

### POINT I

**The dismissal of Eli Lilly's Fair Trade Suit for its failure to register as a foreign corporation does not raise a substantial federal question because Eli Lilly is engaged in intrastate commerce in New Jersey.**

Eli Lilly has set forth the rule of law which, in view of the undisputed facts of this case, requires the dismissal of this appeal on the ground that it does not raise a substantial federal question. Plaintiff expressly admits that if its activities in New Jersey constitute doing business in intrastate commerce, there is no constitutional bar to the dismissal of its suit because of its failure to register as a foreign corporation. Its brief states:

"The rule of the *Paul* case still applies to foreign corporations as regards intrastate commerce in which they engage within a state, even if such intrastate business is done by a corporation which is also engaged in interstate commerce. See, e.g., *Railway Express Co. v. Virginia*, 282 U. S. 441 (1931); *General Ry. Signal Co. v. Virginia*, 246 U. S. 500 (1918). Such corporations are, of course, required to comply with state qualification statutes." (Emphasis added.)

The decisions of this Court fully support, and indeed compel, plaintiff's concession that if it is engaged in intrastate commerce in New Jersey, the dismissal of its Fair Trade suit has not deprived it of any federally protected right: See *Diamond Glue Co. v. U. S. Glue Co.*, 187 U. S. 611, 23 Sup. Ct. 206, 47 L. Ed. 328 (1903); *Interstate Amusement Co. v. Albert*, 239 U. S. 560, 36 S. Ct. 168, 60 L. Ed. 439 (1916); *Union Brokerage Co. v. Jensen*, 322 U. S. 202, 64 S. Ct. 967, 88 L. Ed. 1227 (1944). A statute would be constitutional which voided every New Jersey contract dealing with an intrastate transaction if the contract was made by an unregistered foreign corporation doing both an interstate and a local business in New Jersey. See *Diamond Glue Co. v. U. S. Glue Co.*, *supra*. The penalty for non-registration which New Jersey actually imposes is less stringent. Plaintiff can reinstate its suit at any time if only it complies with N. J. Rev. Stat. 14:15-3, by furnishing the New Jersey Secretary of State with a copy of its certificate of incorporation and a statement setting forth the amount of its authorized and of its issued capital stock, the character of its New Jersey business, the address of its principal office in New Jersey and the name and place of abode of a resident agent for services of process. See: *Day v. Stokes*, 97 N. J. Eq. 378, 127 At. 331 (E. & A. 1925); *Farmers Mutual Hail Insurance Co. of Iowa v. Gorsuch*, 123 Ind. App. 264, 110 N. E. 2d 344 (Ind. Appellate Ct. 1953). Therefore, if Eli Lilly is engaged in an intrastate business in New Jersey, there cannot be the slightest doubt of the constitutional validity of the judgment appealed from.

Before proceeding to demonstrate that Eli Lilly is engaged in intrastate commerce in New Jersey, an erroneous statement contained in plaintiff's brief should be corrected. Eli Lilly suggests that the trial court dismissed its suit "While conceding that appellant's business was entirely in interstate commerce \* \* \*" (Jurisdictional Statement, p. 5). The court made no such concession. The only thing that

the lower court said about that issue at the page of its opinion cited by plaintiff (Opinion, Plaintiff's Appendix C, p. 28) is that "Plaintiff's products are sold to selected wholesale distributors *and* in interstate commerce." (Emphasis added.) That is a far cry from a concession that plaintiff's only business is in interstate commerce. The New Jersey court's opinion states that "plaintiff was, in fact, doing business in this state \* \* \*" (Opinion, Plaintiff's Appendix C, p. 32). It certainly did not say that Eli Lilly was doing a purely interstate business.

This Court, however, has squarely held that activities identical with those of Eli Lilly in New Jersey constitute doing business in intrastate commerce. *Cheney Bros. Co. v. Mass.*, 246 U. S. 147, 38 S. Ct. 295, 62 L. Ed. 632 (1918), holds that when a foreign corporation, acting through its own employees does sales promotion work on behalf of local wholesalers and transmits to such local wholesalers the purchase orders which it has received from local retailers, the foreign corporation is engaged in local commerce. The ultimate issue presented by the *Cheney Bros. Co.* case was the constitutionality of an excise tax which Massachusetts had imposed on the privilege of doing a local business. This Court held that the excise tax was constitutional as applied to a Minnesota corporation whose operations and status were described as follows:

"This company was incorporated under the laws of Minnesota, operates flour mills there, and sells the flour to wholesale dealers throughout the country. It has an office in Massachusetts where it employs several salesmen for the purpose of inducing local tradesmen to carry and deal in its flour. These salesmen solicit and take orders from retail dealers and turn the same over to the nearest wholesale dealer, who fills the order and is paid by the retailer. Thus the salesman, although not in the employ of the wholesaler, is selling flour for him. Of course this a do-

*mestic business,—inducing one local merchant to buy a particular class of goods from another,—and may be taxed by the State, regardless of the motive with which it is conducted.”* (Emphasis added) (246 U. S. at 155)

Except that Eli Lilly produces and sells pharmaceutical products rather than flour, the language quoted above from the *Cheney Bros. Co.* case describes Eli Lilly's activities in New Jersey. Eli Lilly's detailmen promote local sales between wholesalers and drug stores. The detailmen receive purchase orders from drug stores whose inventories they examine and transmit those orders to local wholesalers. The sales are between local wholesale merchants and local retailers. In a similar way, Eli Lilly also promotes local sales between wholesalers and local physicians and institutions. Because part of Eli Lilly's business is, in the language of the *Cheney Bros. Co.* case, *supra*, “inducing one local merchant to buy a particular class of goods from another,” Eli Lilly is engaged in local commerce in New Jersey. *Cf. Ruppert v. Morrison*, 117 Vt. 83, 85 Atl. 2d 584 (Vt. Sup. Ct. 1952); *Ligon v. Alexander Film Co.*, 55 S. W. 2d 1030 (Texas Com. of Appeals 1932) (not officially reported) cert. denied 289 U. S. 760 535 S. Ct. 793, 77 L. Ed. 1503 (1933).

Plaintiff's argument has completely missed the distinction between the instant suit and the *Cheney Bros. Co.* case on the one hand and cases such as *International Textbook Co. v. Pigg*, 217 U. S. 91, 30 S. Ct. 481, 54 L. Ed. 678 (1910) on the other. In the *Pigg* case the only activity of the plaintiff's employee within the forum state was to solicit contracts which the plaintiff itself performed by the shipment of materials in interstate commerce and to collect debts which had become due to plaintiff under such contracts. In *Cheney Bros. Co.* and in the instant case, however, plaintiff's employees in New Jersey promoted



sales and transmitted purchase orders between local wholesalers and local retailers. Eli Lilly's only activities in New Jersey do *not* consist of soliciting orders for sales by it from Indiana to its New Jersey customers and collecting the bills for goods due on account of such sales. Because Eli Lilly is engaged in inducing one New Jersey merchant to buy a particular class of goods from another, it is engaged in a domestic business in New Jersey.

Moreover, not only is Eli Lilly engaged in local commerce within New Jersey, but its suit which was dismissed below arises out of that local commerce and seeks to control it. Plaintiff seeks injunctive relief to prevent a New Jersey retailer from violating the New Jersey Fair Trade Law in the course of over-the-counter transactions with New Jersey consumers. These transactions, between a retail drug store and a customer, are obviously local in character. Whether or not Eli Lilly sells its products in interstate commerce to its local wholesale distributors, the wholesalers' sales of Eli Lilly products to local retailers and the retailers' sales to consumers are local, intrastate transactions.

Under such circumstances Eli Lilly has not been deprived of any privilege to which the Commerce Clause entitles it. New Jersey has not prohibited or threatened to prohibit its continuing its interstate business. It may continue without hindrance to sell its products direct to local New Jersey wholesalers and to fill their orders by shipping its goods from its plant in Indiana. In dismissing plaintiff's Fair Trade suit the New Jersey courts have merely implemented the right of the state to bar a suit instituted in a state court by an unregistered foreign corporation which transacts a substantial and continuous intrastate business in New Jersey. Since such state action has long been upheld by this Court, the instant appeal does not raise a substantial federal question under the Commerce Clause, and it should be dismissed.

## POINT II

**This appeal does not raise a substantial federal question because even if there were doubt that Eli Lilly is doing a local business in New Jersey, the dismissal of its Fair Trade Suit is not violative of the Commerce Clause.**

Even if there were a question about whether Eli Lilly does an intrastate business in New Jersey, the dismissal of its Fair Trade suit would not raise a substantial federal question. Even if it were assumed that Eli Lilly is doing business in New Jersey only in interstate commerce, neither the requirement that it register as a foreign corporation nor the dismissal of its Fair Trade suit as a penalty for non-registration deprives plaintiff of a federally protected right.

First, if Eli Lilly were engaged solely in interstate commerce, would its objection to registering with the New Jersey Secretary of State—considered separately from the dismissal of its suit as a penalty for non-registration—violate the Commerce Clause? The State contends that it would not because compliance is not burdensome and this Court has upheld state regulations of interstate businesses which are far more onerous than registration.

Certainly the burden of registration is not a heavy one. To comply with the statute Eli Lilly would have to furnish the New Jersey Secretary of State with a copy of its certificate of incorporation and a statement showing the amount of its authorized and of its issued capital stock, the character of the business which it is to transact in New Jersey, the principal office of the corporation in the state and the name and abode of a resident agent for service of process. The disclosure provisions of the statute are obviously innocuous, and the appointment of a resident agent would not enlarge plaintiff's existing amenability to

suit. *International Shoe Co. v. State of Washington*, 326 U. S. 310, 66 Sup. Ct. 154, 90 L. Ed. 95 (1945); *Miklos v. Liberty Coach Co.*, 48 N. J. Super. 591, 138 Atl. 2d 762 (App. Div. 1958); N. J. Rev. Rule 4:4-4(d). This "burden" of registration is not so great as to prevent Eli Lilly from continuing to do business in New Jersey.

This Court has frequently upheld the constitutionality of state regulations of foreign corporations engaged in interstate commerce which were at least equally as burdensome as the registration requirement involved in this case. For example, in *Robertson v. People of State of California*, 328 U. S. 440, 66 S. Ct. 1160, 90 L. Ed. 1366 (1946), the Court upheld the constitutionality of a statute which prohibited an agent of a foreign insurance company which was doing business in interstate commerce from soliciting insurance within the state unless both the insurance company and the agent secured state authorization. In *Union Brokerage Co. v. Jensen*, 322 U. S. 202, 64 S. Ct. 967, 88 L. Ed. 1227 (1944), the Court upheld the constitutionality of a state statute requiring the registration of a foreign corporation engaged as a customhouse broker making entry of imported goods. The case of *South Carolina State Highway Department v. Barnwell Bros.*, 303 U. S. 177, 58 S. Ct. 510, 82 L. Ed. 734 (1938), upheld a state statute which excluded from state highways vehicles operating in interstate commerce unless they complied with state size and weight regulations. And in *Panhandle Eastern Pipeline Co. v. Michigan Comm'n.*, 341 U. S. 329, 71 S. Ct. 777, 95 L. Ed. 993 (1951), the Court upheld the right of a state to exclude a foreign corporation which sought to do only an interstate gas pipeline business within the state until it first secured state authorization. If the requirements which were upheld in those cases are constitutional, certainly there can be no doubt of the constitutionality of requiring Eli Lilly to register as a foreign corporation.

New Jersey's interest in enforcing its foreign corporation registration statute against corporations like Eli Lilly which conduct substantial activities within its borders is at least as great as the interests of the various states whose regulatory statutes were upheld in the cases cited above. New Jersey has a right to be apprised of the presence of foreign corporations which are doing a substantial business within the state regardless of whether that business is characterized as interstate or intrastate. This information is essential in order that the state may determine whether any such corporation is subject to our tax laws or to any of our regulatory statutes such as our Workmen's Compensation and Unemployment Compensation Laws. The information which a foreign corporation is required to file with the Secretary of State also serves an important purpose in enabling the citizens of this state who are doing business with a foreign corporation to ascertain the limits of its corporate authority as fixed by its charter and to discover something of its financial structure from the amount of its authorized and issued capital stock. Although a foreign corporation doing business in New Jersey would be amenable to suit in the courts of this State even if it did not appoint a resident agent for service of process, New Jersey has a justifiable interest in providing its citizens with a simpler and more reliable method for acquiring personal jurisdiction over such a foreign corporation.

Of the decisions of this court cited by plaintiff which have considered the right of a state to enforce its foreign corporation registration statutes by dismissing suits brought by an unregistered corporation, only *International Textbook Co. v. Pigg*, 217 U. S. 91, 30 S. Ct. 481, 54 L. Ed. 678 (1910) and *Buck Stove and Range Co. v. Vickers*, 226 U. S. 205, 33 S. Ct. 41, 57 L. Ed. 189 (1912), both construing the same Kansas statute, hold that the registration provision there involved was itself unconstitutional

(apart from the penalty of abatement or dismissal) as applied to a foreign corporation doing an interstate business. Those two cases are distinguishable from the case at bar. The Kansas statute under consideration in *Pigg* and *Buck Stove* was far different from N. J. Rev. Stat. 14:15-3. First of all, the Kansas statute purported to vest in the "state charter board" a power to grant or withhold permission for foreign corporations, including those engaged solely in interstate commerce, to transact business within the state. See 217 U. S. 91 at 101-102, 30 S. Ct. 481 at 482-83, 54 L. Ed. 678 at 683. The New Jersey statute, in contrast, does not purport to give the Secretary of State such discretionary power. If the foreign corporation complies with the simple requirements of N. J. Rev. Stat. 14:15-3, he has a mandatory duty to issue a certificate that the corporation is authorized to transact business in New Jersey. Secondly, the Kansas statute conditions authorization on deposit by the foreign corporation of a percentage of its capital stock in the "permanent school fund." This Court had previously held that provision unconstitutional. See 217 U. S. 91 at 102, 30 S. Ct. 481 at p. 483, 54 L. Ed. 678, at p. 683. There is no such requirement in the New Jersey statute. And, thirdly, the disclosure requirements of the Kansas statute, which required the enumeration of stockholders, were far more onerous than those of the New Jersey law.

Moreover, since the decision of the *Pigg* and *Buck Stove* cases, this Court has recognized that there has been an increasing "tendency \* \* \* toward sustaining states' regulatory and taxing measures formerly regarded as inconsonant with Congress' unexercised power over commerce and to doing so by a new or renewed emphasis on facts and practical considerations rather than dogmatic logic." This "tendency" was explicitly referred to by the New Jersey Trial Court.

Presumably, it is for these reasons that Eli Lilly itself has conceded that "the most objectionable feature of the New Jersey statute and the one directly in issue here is the sanction imposed for failure to obtain a certificate of authority—denial of access to the courts of the state." (Jurisdictional Statement, p. 13). The quoted statement in effect admits that merely requiring Eli Lilly to register as a foreign corporation would not of itself violate the Commerce Clause even if we were to assume that Eli Lilly's business in New Jersey is entirely in interstate commerce.

If New Jersey can constitutionally require that Eli Lilly should apprise the state of its presence and activities by registering with the New Jersey Secretary of State, can New Jersey enforce that requirement by barring plaintiff from maintaining its Fair Trade suit unless it registers? The State contends that such a bar does not violate the Commerce Clause because plaintiff's Fair Trade suit arises from local commerce—a local purchase and sale—and is solely a matter of state concern.

Eli Lilly has cited decisions of this Court which reversed dismissals of suits brought by unregistered foreign corporations which were doing business solely in interstate commerce, but all of those cases are distinguishable from the case at bar. All except one involved causes of action which—unlike the instant suit—were "so directly connected with [interstate commerce] and \* \* \* so essential to its existence and continuance that the imposition of unreasonable conditions upon this right [to maintain such suits] must necessarily operate as a restraint or burden upon interstate commerce." See *Sioux Remedy Co. v. Cope*, 235 U. S. 197, 202-203, 35 S. Ct. 57, 59 L. Ed. 193 (1914). Thus *International Textbook Co. v. Pigg*, 217 U. S. 91, 30 S. Ct. 481, 54 L. Ed. 678 (1910); *Sioux Remedy Co. v. Cope*, *supra*; *Furst v. Brewster*, 282 U. S. 493, 51 S. Ct. 295, 75 L. Ed. 478 (1931); and *Dahne-Walker Co. v. Bondurant*, 257 U. S.



282, 42 S. Ct. 106, 66 L. Ed. 239 (1921) were actions to collect the purchase price due to the various plaintiffs for the sale and delivery in interstate commerce of various commodities or services. These cases stand for the proposition that if a foreign corporation cannot sue in the courts of a state to collect the price of goods which it has shipped there in interstate commerce, then obviously the foreign corporation cannot continue such sales and interstate commerce must come to a halt. The dismissal of a Fair Trade suit which seeks to control the price at which local drug-stores sell pharmaceuticals to local consumers is clearly not a comparable interference with interstate commerce.

The one case cited by plaintiff in which this Court reversed the dismissal of a cause of action which had not arisen directly out of a transaction in interstate commerce was *Buck Store and Range Co. v. Vickers*, 226 U. S. 205, 33 S. Ct. 41, 57 L. Ed. 189 (1912). That was a suit in tort under Kansas law to set aside a fraudulent conveyance. But the opinion of the Court in the *Buck* case does not hold that it was the dismissal of a suit upon a state-created tort which violated the plaintiff's constitutional rights. The opinion emphasizes that the abatement of the suit was error only because the Kansas statute which required the registration of foreign corporations was so onerous that as applied to foreign corporations doing business only in interstate commerce, the registration requirements themselves were an unconstitutional burden upon interstate commerce quite apart from the nature of the penalty provided for their enforcement. That case is inapplicable to the instant suit because the registration requirements with which Eli Lilly and Company has refused to comply are, as previously indicated, wholly innocuous.

It should be emphasized that the suit which was dismissed below was a suit under the "nonsigner provision" of the New Jersey Fair Trade Law. The purpose for which this suit was instituted was to regulate the prices

at which New Jersey drugstores could sell pharmaceutical products to New Jersey consumers. Legally and factually, this price-fixing suit is a matter of wholly local concern. Congress itself has expressly declared that neither the creation nor the enforcement of a statutory right of action against "nonsigners" under a state Fair Trade Law, "shall constitute an unlawful burden or restraint upon or interference with [interstate] commerce." 66 Stat. 632 (1952), 15 U.S.C.A. §45. Section 1 of the cited Act provides:

"That it is the purpose of this Act to protect the rights of states under the United States Constitution to regulate their internal affairs and more particularly to enact statutes and laws, and to adopt policies, which authorize contracts and agreements prescribing minimum or stipulated prices for the resale of commodities and to extend the minimum or stipulated prices prescribed by such contracts and agreements to persons who are not parties thereto. It is the further purpose of this Act to permit such statutes, laws, and public policies to apply to commodities, contracts, agreements, and activities in or affecting interstate or foreign commerce."

This express Congressional recognition that Fair Trade pricing is completely a matter of state policy would make it anomalous indeed for this Court to hold that it is a violation of the Interstate Commerce Clause for a New Jersey statute to prohibit Eli Lilly from maintaining its Fair Trade suit.

Eli Lilly can continue its interstate business, the shipment of pharmaceuticals from Indiana to New Jersey wholesalers, regardless of whether it is permitted to maintain Fair Trade suits in New Jersey courts. The effect of the construction of N. J. Rev. Stat. 14:15-3 and 14:15-5, which has been adopted by the New Jersey Supreme Court is that Eli Lilly will be unable to sue in New Jersey courts

to enforce its minimum retail price maintenance program unless it registers as a foreign corporation. But price protection will still be available to it in New Jersey because under New Jersey law Fair Trade suits may be instituted by wholesalers or by retailers competing with the alleged Fair Trade violator as well as by the manufacturer itself. N. J. Rev. Stat. 56:4-6. See *Burstein v. Charline's Cut Rate*, 126 N. J. Eq. 560, 10 Atl. 2d 646 (Ch. 1940). Thus, despite its inability to prosecute Fair Trade suits in New Jersey courts unless it registers as a foreign corporation, Eli Lilly will still enjoy greater rights in this state than in the numerous states which do not have any effective Fair Trade Laws. Certainly the interstate Commerce Clause does not require that plaintiff's prosecution of state-created rights under New Jersey's Fair Trade Law be permitted to proceed in disregard of registration requirements in coexisting state statutes.

### CONCLUSION

For all of the reasons stated in this brief, the State of New Jersey, Intervenor-Appellee, respectfully requests that this appeal be dismissed or, in the alternative, that the judgment below be summarily affirmed.

Respectfully submitted,

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